



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
2 NAVY ANNEX  
WASHINGTON DC 20370-5100

TRG  
Docket No: 4440-99  
29 March 2001

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 27 March 2001. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board found that you entered the United States Naval Academy (USNA) in 1992 and served in a satisfactory manner until your first class year. On 15 October 1995 a Midshipman H made a statement implicating you in the use of LSD and marijuana. Subsequently, on 22 January 1996, he made a further statement about your drug use.

On 23 January 1996 you submitted a qualified resignation from the Academy. You stated in your resignation letter, in part, as follows:

... in the event military service is not considered appropriate, I acknowledge my recoupment obligation and agree to repay the cost of my education ... I acknowledge that, by virtue of this resignation, I may be or become indebted to the government, but can obtain sufficient funds to liquidate such indebtedness.

On 31 January 1996 the Superintendent, USNA, recommended disapproval of your request for resignation and stated, in part, as follows:

(She) was facing administrative conduct proceedings at the Naval Academy due to her involvement with unlawful drugs, including use of LSD. Before conduct proceedings commenced, evidence of additional misconduct . . . including transfer of marijuana to another midshipman and other multiple instances of use of LSD, was discovered. . . Charges will be preferred against (her) for consideration at an investigation pursuant to Article 32, Uniform Code of Military Justice (UCMJ).

On 31 January 1996 you were charged with possession of drug abuse paraphernalia, one specification of using LSD, one specification of distributing marijuana, and four specifications of using marijuana.

On 15 February 1996 Midshipman C made a statement that Midshipman H had LSD in his possession, and she admitted ingesting some of it. She did not see you use LSD but stated that she discussed it with you during the evening and you were both laughing a lot. On 27 February 1996 Midshipman B made a statement concerning his use of LSD, and stated that he did not see you use LSD, but you told him you were "feeling it".

Subsequently, an investigation was directed pursuant to UCMJ Article 32. On 11 April 1996 the investigating officer (IO) reviewed the charges and found, concerning the charge of possessing drug paraphernalia, that such possession was merely incidental to your alleged use of drugs, and including this offense was unnecessary overcharging. Concerning the charge of using LSD, the IO found that the only evidence was the statement of Midshipman H, and his statement was not corroborated as to an essential fact. He noted that Midshipman B merely testified that he overheard a conversation in which he assumed you were discussing LSD. Concerning the allegations of distributing marijuana, the IO found that the marijuana was jointly possessed by you and Midshipman H and the subsequent relinquishment of control over the marijuana by you did not amount to criminal distribution. Concerning the remaining charges of marijuana use, the IO stated that the only evidence of these offenses was the statement of Midshipman H, an accomplice to the offense, and that military justice frowns on the use of uncorroborated accomplice testimony. The IO also concluded that "the significance of these offenses did not warrant trial by court-martial given the other administrative avenues available to the government."

On 12 April 1996 you waived your right to an investigative hearing after being accused of an unauthorized absence of about three days. On 16 April 1996 the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) denied your earlier

request for a qualified resignation.

Ten days later, the Staff Judge Advocate, USNA informed your counsel that a request for a qualified resignation would now be favorably endorsed. On 29 April 1996 you submitted another qualified resignation. You stated in your resignation letter, in part, as follows:

I acknowledge my connection to the current investigation pertaining to unlawful drug offenses at the Naval Academy, and I admit that I participated in activity which may violate the Conduct Code ... I acknowledge a potential recoupment obligation and agree to repay any lawful cost of my education received at the Naval Academy. I do not, however, hereby waive any arguments I may have as to why I should not be required to repay such costs. ... This resignation is expressly tendered with the request that I be permitted to finish my Spring Semester 1996 classes and examinations prior to it becoming effective, so that I may receive credit for those courses.

On 20 May 1996 the Superintendent, USNA favorably endorsed the qualified resignation and stated, in part, as follows:

... upon reassessment of (her) case, I have determined that a qualified resignation would be an appropriate resolution. ... I strongly recommend approval of her request and I recommend that she be required to reimburse the government in the amount of \$85,328.06 for the cost of her education at the Naval Academy.

On 3 June 1996 ASN(M&RA) approved your resignation and directed recoupment of the cost of your education. You were honorably discharged from the USNA on 12 July 1996 and the reason for discharge was "failure to complete a course of instruction".

In your application you are requesting that you not be required to repay the cost of your education at the USNA. You point out that you were never actually charged with a drug related offense under the Academy's conduct system and that the IO at the Article 32 investigation found that reasonable grounds did not exist to believe that you committed the alleged offenses. You allege that despite this findings, individuals at the USNA coerced you into submitting a resignation by informing you that you would never graduate and the investigation would continue. You contend that your resignation signified neither guilt nor innocence since only a fair hearing could make that determination. Since you did not believe you would not get a fair hearing and wanted to get on with your life, you submitted your resignation. You note that

you had a brother and sister at the Academy and did not want to cause them further embarrassment.

Concerning Midshipman H, you contend that he was an admitted liar and thief who was convicted by a general court-martial of his drug activities at the USNA. You believe that very little credence should be given to any of his sworn statements.

You point out that in many of the related cases, which ultimately involved 19 midshipmen, Midshipman H's testimony or written affidavit was the only direct inculpatory evidence. One of those former midshipman was a Mr. O, who was accused of possessing and using LSD based on the testimony of Midshipman H and one of his friends. You believe that the case against you was weaker than the case against O because one of H's friends testified that he had actually seen O consume LSD, and no such testimony existed in your case. You have provided evidence that the Assistant Secretary of the Navy subsequently waived recoupment in Mr. O's case. You contend that since recoupment was waived in his case it should be waived in yours. In support of this contention, you cite the case of United States v. Kelley, 40 M.J. 558 (NMCMR 1994), which holds that when two cases are closely related and arise from a common scheme, and the disposition of the cases is widely disparate and the record reflects, no good or cogent reason for the disparity, an appellate court should act to remove the disparity. Kelley, at pp. 570-71.

You also noted that none of the midshipmen discharged in 1994 for cheating on the electrical engineering examination were required to pay the cost of their education. In addition, you point to one of this Board's cases in which a waiver of recoupment was recommended for a former midshipman who was discharged following a drunken assault on another midshipman who was on duty at the time. Another case cited from this Board was settled when the individual initiated action in federal court. Therefore, you believe that if recoupment was waived in those cases it should be waived in yours.

Reimbursement of educational expenses is specifically authorized by 10 U.S.C. § 2005. Further, the statute requires that midshipman enter into an agreement in which they acknowledge that reimbursement may be directed if they fail to graduate from the Academy. Midshipmen who are discharged or resign due to misconduct are routinely required either to serve in an enlisted status or reimburse the government for educational expenses and that requirement is rarely waived.

In reaching its decision, the Board noted the recommendation of the IO that the charges against you not result in trial by a court-martial. However, the IO noted that there were other

administrative avenues available. One of these avenues was an administrative conduct proceeding at which the standard of proof would have been a preponderance of the evidence rather than the more stringent standard of beyond a reasonable doubt, which would have been applied at a court-martial. However, you precluded any further administrative consideration of your case by submitting your resignation, and you admitted guilt in your resignation letter. There is no evidence in the record, and you have submitted none, to show that your resignation was coerced. It is clear that you received at least some benefit from the resignation because when it was accepted, you were honorably discharged due to failure to complete a course of instruction and not for misconduct.

Concerning the decision to waive recoupment of educational costs for Mr. O in 1996 despite his use of LSD, the Board determined that this waiver action resulted from political considerations and concluded that this case should not be viewed as setting a precedent that should be followed. Additionally, the Board did not believe that the case of United States v. Kelley, supra, which related to disparate sentences from courts-martial has much relevance to an administrative determination involving the recoupment of educational costs.

The Board was aware that the 24 midshipman expelled because of cheating in 1994 were granted waivers of recoupment only because the investigation concerning the cheating scandal took so long. It is clear that this action was never intended to set a precedent for other cases.

Concerning one of the cases from this Board that you cited, although the Board recommended that the educational costs not be recouped, this recommendation was denied by ASN(M&RA). Therefore, this individual was required to repay the cost of his education and it does not support your contention that you have been treated differently than others. In the other case you cited, the Board denied relief and, after the applicant initiated action in federal court, the case was settled. However, the Board noted that cases are settled for various reasons, and such a settlement is not precedential in nature.

Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval

Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER  
Executive Director



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TRG:jdh  
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This is in reference to your interest, as counsel, in the case of [redacted]

Enclosed is a letter address to [redacted], informing her that her application has been denied. It is requested that you transmit the denial letter to her, a copy of which is enclosed for your records.

It is regretted that a more favorable reply cannot be made.

Sincerely,

W. DEAN PFEIFFER  
Executive Director

Enclosures